Sutures (M) Sdn Bhd v Worldwide Holdings Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–1079 OF 2010
LIM CHONG FONG JC
28 APRIL 2014

Contract — Agreement — Validity — Performance of obligations under agreement — Delay — Whether agreement breached — Whether contract repudiated — Whether contract lawfully terminated — New contract entered between defendants — Whether there was exclusive agreement between plaintiff and third defendant — Whether new contract between defendants was with lawful object — Contracts Act 1950 ss 52, 53 & 55

The plaintiff had conceived a business plan to manufacture and market halal surgical sutures to the Muslim community in South East Asia ('the project') and had entered into a contract with the third defendant, a German company. The plaintiff made a loan application to Bank Pembangunan (M) Bhd ('the bank') and at the same time, while waiting for approval of the loan from the bank, the plaintiff offered the first defendant, a public listed company substantially owned by the Selangor State Development Corp ('PKNS'), to participate and invest in redeemable preferential shares in the plaintiff. On 14 September, the first defendant accepted the offer plaintiff's offer subjected to certain conditions. On the same day, the third defendant informed the plaintiff that it had failed to issue the required letter of credit from any bank in Malaysia directly to the third defendant's bank in Germany which was required by the contract agreement. The third defendant then treated the contract agreement as cancelled by the plaintiff with immediate effect. However, on 3 February 2010, the second defendant, a subsidiary company of the first defendant, had executed an agreement with the third defendant. The plaintiff wrote to the first and second defendants to withdraw from their intended venture with the plaintiff's principal, the third defendant. The plaintiff also sent a letter of demand to the third defendant to rectify the third defendant's act of having dealt and ventured directly with the first defendant. The plaintiff submitted that the plaintiff had entrusted the first defendant the project documentation with full confidence and trust, and that the first defendant through the second defendant however conspired with the third defendant to hijack the project from the plaintiff. The plaintiff sought remedies for, inter alia, (i) a declaration that the contract agreement was valid and enforceable; (ii) a declaration that the agreement between the second defendant and third defendant was null and void; (iii) an injunction restraining the third defendant from executing the processing of the project; and (iv) specific performance of the contract agreement.

Held, dismissing the claim with costs:

(1) The plaintiff was in breach of the condition on payment stipulated in the contract agreement. Without the bank loan in place after more than nine months since the execution of the contract agreement, the plaintiff was in inexcusable delay and had effectively disabled itself from performing the major obligations under the contract agreement such as payment to the third defendant, procurement of the land and building of the factory for the project. These were major obligations of the plaintiff that have to be performed within the stipulated times in the contract agreement, otherwise within reasonable time, to bring the commercial object of the contract agreement into realisation and fruition. In this case, the commercial object of the contract agreement was accordingly thwarted (see paras 51–52).

(2) The plaintiff had repudiated the contract. It was justified for the third defendant to terminate the contract agreement because the plaintiff had plainly disabled itself to give effect to the commercial object of the contract agreement. The contract agreement was hence lawfully terminated by the third defendant (see paras 56 & 60).

(3) There was no exclusivity agreement between the plaintiff and the third defendant. Accordingly, the third defendant was in principle entitled to enter into an agreement with a third party including the second defendant without being in breach of contract. The contract between the second and third defendants was thus made with a lawful object and by lawful means (see para 69).

(4) It was not unusual for a holding company to utilise its subsidiary to carry out the business. Furthermore, the contract was only entered after a detailed business feasibility appraisal was carried out by the first defendant. It was not made in haste and this militated the suggestion that the project was hijacked. The defendants' actions were merely to protect their own self interest to undertake an equivalent suture manufacturing project (see paras 67–68).

[Bahasa Malaysia summary

Plaintif telah membentuk satu pelan perniagaan untuk mengilangkan dan memasarkan benang pembedahan halal kepada masyarakat Islam di Asia Tenggara ('projek') dan telah memasuki sebuah kontrak dengan defendan ketiga, sebuah syarikat Jerman. Plaintif membuat permohonan pinjaman kepada Bank Pembangunan (M) Bhd ('bank') dan pada masa yang sama, sementara menunggu kelulusan pinjaman daripada pihak bank, plaintif menawarkan defendan pertama, sebuah syarikat senaraian awam yang secara asasnya dimiliki oleh Perbadanan Kemajuan Negeri Selangor ('PKNS'), untuk menyertai dan melabur dalam saham utama boleh tebus ke atas plaintif. Pada 14 September, defendan pertama menerima tawaran plaintif tertakluk kepada

beberapa syarat. Pada hari yang sama, defendan ketiga memaklumkan plaintif ia telah gagal untuk mengeluarkan surat kredit yang diperlukan daripada mana-mana bank di Malaysia secara langsung kepada bank defendan ketiga di Jerman seperti yang diperlukan oleh perjanjian kontrak. Defendan ketiga kemudiannya menganggap perjanjian kontrak tersebut sebagai dibatalkan oleh plaintif dengan kadar segera. Walau bagaimanapun, pada 3 Februari 2010, defendan kedua, sebuah syarikat subsidiari defendan pertama telah menguatkuasakan sebuah perjanjian dengan pihak ketiga. Plaintif menulis kepada defendan pertama dan kedua untuk menarik balik daripada usaha sama yang dihajatkan dengan prinsipal plaintif, defendan ketiga. Plaintif juga menghantar satu surat tuntutan kepada defendan ketiga untuk membetulkan tindakan defendan ketiga dalam menguruskan dan membuat usaha sama secara langsung dengan defendan pertama. Plaintif menghujah bahawa plaintif telah memberikan dokumen projek kepada defendan pertama dengan penuh keyakinan dan kepercayaan, dan bahawa defendan pertama melalui defendan kedua sebaliknya berkonspirasi dengan defendan ketiga untuk merampas projek daripada plaintif. Plaintif menuntut remedi untuk, antara lainnya, (i) satu deklarasi bahawa perjanjian kontrak adalah sah dan boleh dikuatkuasakan; (ii) satu deklarasi bahawa perjanjian antara defendan kedua dan ketiga adalah terbatal dan tidak sah; (iii) satu injunksi menghalang defendan ketiga daripada menjalankan pemprosesan projek; dan (iv) pelaksanaan spesifik perjanjian kontrak.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif telah melanggar syarat pembayaran seperti yang dinyatakan dalam perjanjian kontrak. Tanpa pinjaman bank mengambil tempat selepas lebih daripada sembilan bulan selepas penguatkuasan perjanjian kontrak, plaintif telah mengalami kelewatan yang tidak boleh dimaafkan dan memberi kesan menghalang dirinya daripada menjalankan kewajipan utama di bawah perjanjian kontrak seperti pembayaran kepada defendan ketiga, mendapatkan tanah dan membina kilang untuk projek tersebut. Ini merupakan kewajipan utama plaintif yang perlu dijalankan dalam jangka masa yang dinyatakan dalam perjanjian kontrak, jika tidak dalam masa yang munasabah, untuk membawa tujuan komersial perjanjian kontrak direalisasikan dan membuahkan hasil. Dalam kes ini, tujuan komersial perjanjian kontrak dengan itu telah gagal (lihat perenggan 51–52).

(2) Plaintif telah menolak kontrak tersebut. Adalah wajar untuk defendan ketiga untuk menamatkan perjanjian kontrak tersebut kerana plaintif dengan jelas telah menghalang dirinya untuk memberi kesan kepada tujuan komersial perjanjian kontrak tersebut. Perjanjian kontrak tersebut dengan itu ditamatkan secara sah oleh defendan ketiga (lihat perenggan 56 & 60).

(3) Tidak terdapat perjanjian secara eksklusif antara plaintif dan defendan ketiga. Sehubungan dengan itu, defendan ketiga mengikut prinsip berhak untuk memeterai perjanjian dengan pihak ketiga termasuk defendan kedua tanpa melanggar kontrak. Kontrak di antara defendan kedua dan ketiga oleh itu dibuat dengan tujuan sah dan melalui cara yang sah (lihat perenggan 69).

(4) Adalah bukan di luar kebiasaan untuk syarikat induk untuk menggunakan subsidiarinya untuk menjalankan perniagaan. Lebih-lebih lagi, kontrak hanya dimasuki selepas satu penilaian kebolehlaksanaan perniagaan terperinci yang dijalankan oleh defendan pertama. Ia tidak dilakukan secara tergesa-gesa dan ini membawa kepada cadangan bahawa projek tersebut telah dirampas. Tindakan defendan hanyalah untuk melindungi kepentingan mereka sendiri untuk menjalankan satu projek pembuatan benang yang sama (lihat perenggan 67–68).]

Notes

For a case on validity, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3002.

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 170, CA (refd)

Elders Keep Ltd v Luen Mei Plastics Industries Sdn Bhd [1989] 1 CLJ 517, HC (refd)

Hill (J M) & Sons Ltd v London Borough of Camden (1980) 18 BLR 31, CA (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of the Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

Jaks-KDEB Consortium Sdn Bhd v Perbandanan Urus Air Selangor Bhd & Ors [2012] 3 MLJ 324, HC (refd)

Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd [2007] 4 MLJ 128, CA (refd)

Rasiah Munusamy v Lim Tan & Sons Bhd [1985] 2 MLJ 291, SC (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd) (refd)

Seah Siang Mong v Ong Ban Chai & Anor [1996] MLJU 484 ; [1998] 1 CLJ Supp 295, HC (refd)

Teh Wan Sang & Sons Sdn Bhd v See Teow Chuan [1984] 1 MLJ 130 (refd)

Unitramp v Garnac Grain Co Inc, The Hermine [1979] 1 Lloyd's Rep 212, CA (refd)

Universal Cargo Carriers Corpn v Citati [1957] 2 QB 401, QBD (refd)

A *Vitol SA v Norelf Ltd; The Santa Clara* [1996] 3 All ER 193, HL (refd)

Legislation referred to

Contracts Act 1950 s 40, 52, 53, 55
Evidence Act 1950 ss 101, 102, 103

B

M Indrani (Jamaludin Ibrahim & Assoc) for the plaintiff.
John SN Fam (Freda Santiago with him) (SN Fam & Co) for the first and second defendants.
Mohd Arief Emran Arifin (Wong & Partners) for the third defendant.

C

Lim Chong Fong JC:

INTRODUCTION

D **[1]** This is a commercial action concerning a terminated supply of machinery and services contract coupled with associated allegation of economic tort of conspiracy to supplant the contract.

E **[2]** The plaintiff is a private limited company with a RM100,000 cash paid up share capital. A business plan was conceived by the plaintiff to manufacture and market halal surgical sutures to the Muslim community in South East Asia ('the project'). Surgical sutures are threads used to stitch and hold body tissues after surgical incision. Animal gut is used to manufacture the sutures.

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[3] The first defendant is a public listed company substantially owned by the Selangor State Development Corp ('PKNS') and the second defendant is a subsidiary company of the first defendant. The third defendant is a German company with expertise in the production of machinery for the medical
G industry that includes suture manufacturing facilities.

THE TRIAL PROCESS

[4] By consent, the trial at this stage is limited to issues of liability and the
H trial took two days on 23–24 January 2014. The documentary evidence adduced at the trial is trial Bundles B–F and exhs P1, P2, P3, D4 and P5 were admitted in evidence during the course of the trial.

I **[5]** The following witnesses testified for the plaintiff and the first and second defendants respectively:

(a) Suhaimi bin Hashim ('PW1') who is the managing director of the plaintiff;

(b) Zakaria bin Saad ('PW2') who is the vice president of Development Bank Bhd;

(c) James Tan Boon Pock ('PW3') who is the director of Pioneer Rhythm Sdn Bhd; and

(d) Kamil Suhaimi bin Baharin ('DW1') who is the company secretary of the first and second defendant company.

The third defendant however elected to submit there is no case to answer after the close of the plaintiff's case and accordingly did not call any witness to defend the third defendant's case.

[6] After the conclusion of the trial, the parties concurrently submitted their written closing arguments in chief followed by their written submission in reply. There were oral clarifications by counsel on 15 April 2009.

BACKGROUND FACTS

[7] In the effort to implement the project, the plaintiff in mid 2008 met and negotiated with the third defendant on the prospects and feasibility to set up suture manufacturing facilities. The third defendant gave a quotation offer No 2823935 to the plaintiff on 3 December 2008.

[8] In the meantime, the plaintiff by a letter dated 23 October 2008 received the confirmation of support from the Ministry of Health for the project. Furthermore, the plaintiff on 7 November 2008 appointed a Suhaimi bin Hashim as the professional consultant on business development and marketing of the project.

[9] By a written agreement dated 16 December 2008 ('the contract agreement'), the plaintiff and the third defendant entered into the contract in relation to the supply of machinery, documentation and technology for the production of surgical sutures in Malaysia.

[10] The material terms of the contract agreement (wherein the plaintiff is referred to as 'Buyer' and the third defendant is referred to as 'Seller-WOBA' respectively) are:

1. Project

Both parties have agreed that the 'SELLER-WOBA' shall supply different machinery, planning of building, know-how instructions and training for the production of surgical sutures. The capacity of the plant will be 30% Catgut and 70% synthetic, max one shift.

2. Obligations of the 'SELLER-WOBA'

2.1.1 Object of Agreement

Supply of machinery, planning of manufacturing building, course of manufacture, supply and delivery of the necessary know-how for the production of the products mentioned under 1.1 with the raw materials mentioned under 1.2

4. Time of Supply and delivery

4.1 Plans and Instructions

Planning of manufacturing building according to Para 2.1.2, planning of production according to Para 2.1.3, as well as the written know-how instruction according to Para 2.1.4.1 will be delivered within a period of 1–2 months after receipt of the payment according to Para 8.3.

4.3 Supply of the Machinery

The 'SELLER-WOBA' has to supply the machinery according to the offer No. 2823935 dated 03.12.2008 within the period mentioned in this offer after receipt of the payment according to Para 8.3.

4.4 Mounting of the Machines

The mounting will begin latest 4 months after the 'SELLER-WOBA' receives from the 'BUYER' the confirmation about readiness of the complete building and equipment. As far as the confirmation about readiness is not available latest 12 months after readiness of the final machinery shipment, the 'SELLER-WOBA' will issue a certificate according to 'annexure REP-REC' unless both parties agree to an other period. After the mounting is finished, the mounting confirmation as per annexure 'M-CON' will be signed. The mounting is then finished.

In case or reasons, which do not fall under the responsibility of the 'SELLER-WOBA', especially if the 'BUYER' is not carrying through the necessary steps according to 6.1, 6.2, 6.3, 6.4, 6.5 and 6.8 within 12 months after readiness of the final shipment of machines, the 'BUYER' will lose the title for mounting. If both parties agree, the 'SELLER-WOBA' will offer updated conditions for this service.

6. Obligations of the 'BUYER'

The 'BUYER' has to provide the following performances, which are not covered by the 'SELLER-WOBA's' scope of service and delivery.

6.2 Building, Machinery, Equipment

The complete manufacturing plant, including building, aircondition, installations (water electricity ...), locally made equipment, accessories and special machinery has to be made available and assembled and functional condition in accordance with the planning of the 'SELLER-WOBA'.

6.5 Lawful Instructions

The whole manufacturing plant is built and carried on by the 'BUYER' in full responsibility in accordance with the applicable laws of Malaysia.

The services of the 'SELLER-WOBA' are restricted exclusively on the general, not Malaysia-specific, consultations and recommendations.

6.8 Payment of the Purchase Price

The 'BUYER' is obliged to pay the agreed payments according to Para 8 of this Contract.

8. Prices, Terms and Payment

8.1 Prices

The prices are according to offer No 2823935 dated 3 December 2008 (annexure 1) for the total amount EURO 11.010.000, which is an intergral part of the contract.

The calculation of the L/C amount is as follows:

Project for Surgical Suture (as per offer No 2823935)	EURO	11.800.000, -
Goods Value FOT Augsburg	EURO	11.800.000,-
Freight charges up to seaport	EURO	100.000,-
Transport insurance	EURO	10.000,-
Total value INCO	EURO	11.900.000,-

8.3 Payment

8.3.1 Commitment

The 'BUYER' had transfer by swift a symbolic deposit (equal to EURO:39.000,-) to the 'SELLER-WOBA' as his signal of readiness to:

DEUTSCH BANK, Augsburg, Germany

Germany SWIFT (BIC) Code: DEUTDEDB720

IBAN: DE20 7207 0024 0016 1505 00

Account: BIRKMAIER Project GmbH, Augsburg

This deposit will be returned to the 'BUYER' within 10 working days after the L/C is issued according to this contract. As fare as the L/C will not be issued according to this contract, this commitment will cover the expenses of the 'SELEER-WOBA'.

8.3.2 Letter Of Credit (L/C)

Within 6 months from the date of signature the 'BUYER' will instruct his bank to issue an irrevocable letter of credit (L/C), as per annexure 2, for the amount of EURO 11,910,000, and confirmed through on the following banks of BIRKMAIER Project GmbH:

DEUTSCHE BANK, Augsburg, Germany

SWIFT (BIC) Code : DEUTDEDB720

IBAN : DE 20 7207 0024 0016 1505 00

Account: BIRKMAIER Project GmbH, Augsburg

8.3.2.1 First Payment

The L/C will allow a 1/3 payment (equal to EURO 3,9700,000) payable at sight against presentation of invoice.

8.3.2.2 Second Payment

The L/C will allow 2/3 final payment (equal to EURO 7,940,000) payable at sight against presentation of the documents, mentioned in annexure 2 (L/C Instructions).

8.3.7 Late Payment

If the payment of invoices is delayed, or if the L/C is not issued according to this contract, the 'SELLER-WOBA' — reserves the right to invoice 3% (three percent) interest per year for this interval. The 'SELLER-WOBA' — reserves the right to balance these amounts with other payments or contracts.

9. General

9.3.1 Applicable Law and Competency

The legal relationship with the Buyer is governed by the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (UN Sales Convention) in the English version. Where standard terms of business are used, the CIP TERMS 1990 of the International Chamber of Commerce and the provisions stipulated in this respect in this contract apply.

Outside the application of the UN Sales Convention, the contractual and non-contractual legal relationship between the parties is governed by the non-uniform German law, namely by the BGB/HGB (German civil and commercial code).

This contract is regulated by the law of F. R. Germany. The exclusively place of the court for all differences out of this contract is Augsburg, F. R. Germany.

9.4 Immediate Cancellation

The 'SELLER-WOBA' can rescind this contract with immediate effect after communicating it to the other party by means of registered letter with acknowledgement of delivery or by telefax or email, if the supply of the products according to this contract is or will be prohibited by law (AWV = Aussenwirtschaftsverordnung) or if any payment for this contract or any other contract between the 'SELLER-WOBA' and the 'BUYER' is not being paid as per terms of this contract.

[11] Pursuant to the contract agreement, the plaintiff paid the third defendant the sum of 5,000 Euros and 39,000 Euros for the feasibility study fees and commitment fees respectively.

[12] By a letter dated 5 February 2009, the Ministry of International Trade and Industry in response to the plaintiff's application dated 12 November 2008 approved the issuance of the manufacturing license to manufacture the surgical sutures on Lot 2207, Batu 6 Bukit Naga Seksyen 32, 40460 Shah Alam, Selangor subject to conditions which include the submission of various documentation and securing the approval of SSIC Bhd to house the manufacturing facility at the proposed site.

[13] As for the funding of the project, the plaintiff on 10 March 2009 made a loan application to Bank Pembangunan Malaysia Bhd ('the bank') for a loan of about 86m Ringgit.

[14] The plaintiff further negotiated with the third defendant for funding as well. By a letter dated 20 March 2009, the third defendant wrote to the plaintiff expressing interest to further participate as a shareholder in the plaintiff with a commitment of up to 2m Euros subject to conditions which included the down payment required pursuant to the contract agreement.

[15] This further participation of the third defendant did not however come to fruition.

[16] Accordingly whilst waiting for approval of the loan from the bank, the plaintiff met the first defendant on 31 March 2009 and offered the first defendant to participate and invest in redeemable preferential shares amounting to 6m Ringgit in the plaintiff. The proposed participation of the first defendant was to enable the plaintiff to commence implementation of the project pending approval of the bank loan. The details of the plaintiff's proposal for subscription of shares were communicated to the first defendant in the plaintiff's letter dated 21 April 2009.

[17] The plaintiff on 12 May 2009 submitted various documents as required by the bank and urged the bank to promptly consider the plaintiff's application by reason that the payment deadline between the plaintiff and the third defendant in the contract agreement would soon be expiring.

[18] In the meantime, the plaintiff informed the third defendant that the plaintiff would hold the final meeting with the bank on 6 June 2009. The third defendant responded that it looked towards receipt of the letter of credit by 16 June 2009 as promised in the contract agreement.

[19] The bank responded to the plaintiff on 12 June 2009 indicating that the bank was prepared to consider providing the plaintiff with credit facilities in support of the project but required further documentary submission from the plaintiff for the bank to evaluate the project. Accordingly, the plaintiff communicated with the third defendant via teleconversation and email on the status of the bank loan and the contract agreement.

[20] On 22 June 2009, the third defendant responded to the plaintiff by email that it was on standby to receive the letter of credit required under the contract agreement within the next 60–90 days, to wit: until 17 August–17 September 2009.

[21] Also on 22 June 2009, the first defendant invited the plaintiff to give the project presentation to its executive committee on 26 June 2009. The presentation was made and the first defendant on 8 July 2009 wrote to the plaintiff accepting the plaintiff's proposal to subscribe shares in the plaintiff subject to terms and conditions to be finalised by both parties and the execution of a formal agreement.

[22] By letter dated 27 July 2009, the Selangor State Secretary wrote to the plaintiff that it has no objection to the project and the plaintiff's application for a manufacturing license in connection thereto subject to the plaintiff complying with the conditions imposed by various relevant authorities. Further, SSIC Bhd also by letter dated 28 July 2009 wrote to the plaintiff that it had no objection to the proposed manufacturing facility site.

[23] The third defendant on 5 August 2009 wrote to the plaintiff by email confirming that the third defendant had contacted the bank and was informed that the financing for the project was ready and the plaintiff could issue the required letter of credit from any bank in Malaysia directly to the third defendant's bank in Germany. The third defendant accordingly gave to the plaintiff the specimen draft text of the letter of credit.

[24] The plaintiff on 2 September 2009 obtained the manufacturing license for surgical sutures from the Ministry of International Trade and Industry. Due to pressing cash flow needs to have the project launched, the plaintiff also on 2 September 2009 further offered to the first defendant to participate and invest in ordinary shares amounting to RM6,300,000 in the plaintiff. By that further offer, the first defendant would be the major shareholder of the plaintiff if the first defendant accepted it. The offer was however subjected to the condition that the first defendant would forthwith be obliged to contribute the 1/3 down-payment required in the contract agreement amounting to 3,970,000 Euros besides to also provide project financing.

[25] The first defendant responded to the plaintiff by letter dated 14 September 2009 that the first defendant accepted the offer in principle subject to the following conditions:

(a) extension of the contract agreement to be secured from the third defendant;

(b) meeting to be arranged with the third defendant; and

(c) terms and conditions to be discussed and finalised with the plaintiff before entering into any binding legal agreement.

[26] On the same day 14 September 2009, the third defendant wrote to the plaintiff that the plaintiff failed to issue the letter of credit required by the contract agreement notwithstanding that it was already extended. The third defendant treated the contract agreement as cancelled by the plaintiff with immediate effect. Furthermore the third defendant also demanded for compensation pursuant to cl 8.3.7 of the contract agreement.

[27] The plaintiff did not respond to the third defendant in writing but PW1 testified that he spoke to Mr Birkmaier of the third defendant over the telephone wherein the third defendant willingly gave a further extension of time for payment to the plaintiff to be made known in the invoice to be issued.

[28] The third defendant then on 16 September 2009 sent to the plaintiff its invoice No 11346-291508 for a lesser amount of 1,400,000 Euros to be paid by 30 September 2009. The plaintiff also did not pay as per the invoice.

[29] By a letter dated 19 November 2009, the bank finally responded to the plaintiff offering certain Islamic financing facilities subject to terms and conditions which included assignment of the project land and creation of a debenture incorporating a first fixed charge on machinery and equipment for the project as security. The plaintiff only accepted the bank's offer on 29 December 2009.

[30] In the meantime, the first defendant by letter dated 16 December 2009 notified the plaintiff that the first defendant did not received the requested feedback on the extension of the contract agreement as well as meeting with the third defendant as per the letter dated 14 September 2009 and the first defendant has accordingly decided not to pursue this business venture with the plaintiff. There was no contemporaneous response from the plaintiff.

[31] The plaintiff then by letter dated 8 January 2010 wrote to the third defendant that the plaintiff understood their agreement had already lapsed since September 2009. The plaintiff attributed the delay in the materialisation of the project to the late approval of the bank loan and the plaintiff hence requested the third defendant for re-activation of the contract agreement soon.

[32] The solicitors for the bank by letter dated 28 January 2010 wrote to the plaintiff pertaining to the preparation of the loan documentation but the plaintiff sought for an extension of time by letter dated 16 March 2010.

[33] On 22 March 2010 the plaintiff wrote to the bank that there was a proposed change in the shareholding structure of the plaintiff with the inclusion of a Pioneer Rhythm Sdn Bhd as ordinary and preferential shareholders. The bank subsequently approved the request for extension of

time to execute the security documents till 30 September 2010 subject to the resolution of certain issues including the new proposed shareholding of the plaintiff.

[34] The plaintiff then by letter dated 16 April 2010 wrote to censure the first defendant after learning that the second defendant had executed an agreement with the third defendant on 3 February 2010.

[35] The first defendant replied to the plaintiff by letter dated 23 April 2010 disagreeing with the contentions of the plaintiff. Amongst others, the first defendant stated that the plaintiff had not responded to the first defendant's letter dated 14 September 2009. Furthermore the first defendant received a letter from the third defendant dated 11 December 2009 wherein the third defendant confirmed that the contract agreement had been terminated and the third defendant accordingly offered the first defendant to be the new investor.

[36] The plaintiff through its solicitors, Jamalludin Ibrahim & Assoc by a letter of demand dated 1 July 2010 wrote to the first and second defendants to withdraw from their intended venture with the plaintiff's principal, the third defendant.

[37] The plaintiff through the same solicitors also sent a letter of demand to the third defendant dated 1 July 2010 to rectify the third defendant's act of having dealt and ventured directly with the first defendant.

[38] The third defendant replied by letter dated 20 July 2010 disputing the demand and reiterated that the contract agreement had been cancelled due to the plaintiff's multiple breaches of its duties. The third defendant's German attorney, Dr Hille & Partner also replied to the plaintiff's solicitors by letter dated 22 July 2010 that the demand was unfounded and the contract agreement was declared avoided in September 2009.

THE PLAINTIFF'S CONTENTION

[39] In the pleadings, the plaintiff contends that the plaintiff entrusted the first defendant the project documentation with full confidence and trust that the plaintiff will not be betrayed by the first defendant, being a company wholly owned by the Selangor State Government. The first defendant through the second defendant however conspired with the third defendant to hijack the project from the plaintiff.

[40] Accordingly, the plaintiff prays for an array of remedies, amongst others, for:

(a) a declaration that the contract agreement is valid and enforceable;

(b) a declaration that the agreement between the second defendant and the third defendant is null and void;

(c) an injunction restraining the third defendant from executing the processing of the project;

(d) specific performance of the contract agreement; and

(e) both special and general damages in addition or in lieu of specific performance.

THE DEFENDANTS' CONTENTIONS

[41] The first and second defendants in crux contend that there was no conspiracy leveled against the plaintiff because the contract entered with the third defendant was for a lawful object via lawful means.

[42] As for the third defendant, the contention is that the contract agreement was properly terminated in September 2009 due breaches of contract by the plaintiff as admitted by the plaintiff in its letter dated 8 January 2010. In respect of the conspiracy allegation, the third defendant contended there was no joint enterprise with the first and second defendants to injure the plaintiff. The third defendant only entered into the contract with the second defendant after the contract agreement was terminated. There was also no exclusivity clause in the contract agreement and the third defendant entered into the agreement with the second defendant to protect its Malaysian business interest but not to injure the plaintiff.

FINDINGS OF THE COURT

[43] The first of the two primary issues on liability for determination in this action is on the termination of the contract agreement.

[44] It is noted that the governing law of the contract agreement is German law. The parties have however not pleaded foreign law in the pleadings that require the dispute to be resolved in accordance with German law. Thus, the presumption is that the foreign law, to wit — German law here is the same as Malaysian law following *Elders Keep Ltd v Luen Mei Plastics Industries Sdn Bhd* [1989] 1 CLJ 517 where VC George J (as he then was) said: 'The last point raised is the law applicable to the bills as to their validity being English law … although the action on the bill may be tried in our Courts, our Courts should apply English law which is foreign law. That being the case, it is submitted that the O 14 summary procedure is not suitable since what the foreign law is should be proved as a fact to the Court by the oral testimony of experts on the

relevant foreign law. While indeed such a rule, it has to be considered in the light of the presumption that foreign law is the same as Malaysian law. *Private International Law by Cheshire & North* (10th Ed) sets out the proviso to the rule as follows at p 127: The established rule is that knowledge of foreign law, even of the law obtaining in some other parts of the Commonwealth is not to be imputed into an English judge. Unless the foreign law with which a case is connected is pleaded by the party relying thereon, then it is presumed that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference. If there is no such plea, or if the difference is not satisfactorily proved, the Court must give a decision according to English law, even the case may be connected solely with some other foreign country'.

[45] The third defendant has argued (and which is not challenged by the plaintiff) that the contract agreement comprised of reciprocal obligations as prescribed in ss 52, 53 and 55 of the Contracts Act 1950. In gist, where there are simultaneous promises to be performed by both parties under a contract, the promisor need not perform his promise unless the promisee is ready and able to perform his corresponding promise.

[46] The third defendant accordingly argued that it is the plaintiff's duty to first fulfill its side of the bargain in cl 6 before the third defendant is able and obliged to perform its corresponding bargain in cl 2 of the contract agreement. The plaintiff has in this respect after more than nine months since the execution of the contract agreement failed to comply with the following, to wit — the plaintiff had not yet:

(a) purchased the land for the project;

(b) obtained the relevant authority approvals for the project factory; and

(c) issued the letter of credit for payment to the third defendant

as at September 2009 as conceded by PW1, the plaintiff's managing director himself.

These are major obligations of the plaintiff that have to be performed within the stipulated times in the contract agreement, otherwise within reasonable time, to bring the commercial object of the contract agreement into realisation and fruition.

[47] As for the letter of credit issuance obligation, it is plain as expressed in cl 8.3.2 of the contract agreement that the plaintiff must do so by 15 June 2009. As to the other obligations, the reasonable time in my view to procure and complete the purchase of the land and secure the necessary authority approvals to build the project factory is also within six months from the execution of the contract agreement, to wit: 15 June 2009. This deadline of six

months would coincide with the stipulated plaintiff's obligation to issue the letter of credit for payment to the third defendant, because thereafter, it has been expressly stipulated that the other follow on activities such as the planning of the factory building and planning for production would follow as provided in cl 4.1, and so on as per the rest of cll 4.3–4.5 of the contract agreement. It is therefore critical in the circumstances for the plaintiff to schedule its financing accordingly in order to meet its obligations timeously.

[48] Notwithstanding that the plaintiff applied for a loan from the bank, the loan facilities were only approved on 19 November 2009. The approval was also only preliminary, subject to terms and conditions which the plaintiff did not fulfill and complete the necessary documentation to enable drawdown to be made, even way into 2010.

[49] It is plain to me that the plaintiff was solely dependent on the loan from the bank to finance the entire project. Besides the large amount of money needed to procure the land and construct the factory, the loan is critically required to fund the issuance of the letter of credit to pay the third defendant by 15 June 2009 in accordance with the contract agreement. The third defendant gave a further extension of time of three months but by early September 2009, the plaintiff was still not able to secure the loan approval, let alone the drawdown of the bank loan.

[50] The plaintiff then turned to the first defendant for financing in consideration and return for increased shareholding of the first defendant in the plaintiff. The first defendant agreed in principle subject to conditions but the plaintiff again could not fulfill them in time to have the letter of credit issued to the third defendant by 30 September 2009. There is no evidence that the plaintiff had in the second half of September 2009 urgently and actively pursued the first defendant to wrap up their further deal as per the first defendant's agreement in principle of 14 September 2009 and get the first defendant to finance the payment to the third defendant by the extended deadline of 30 September 2009. The plaintiff was supposed to have also arranged for a meeting between the first and third defendant but that did not appear to have been done.

[51] Without the bank loan in place after more than nine months since the execution of the contract agreement, the plaintiff was in inexcusable delay and has effectively disabled itself from performing the major obligations under the contract agreement such as payment to the third defendant, procurement of the land and building of the factory for the project. The commercial object of the contract agreement as stipulated in cl 2.1.1 was accordingly thwarted.

[52] In the circumstances, I find and hold that the plaintiff was in breach of the condition on payment stipulated in the contract agreement. Besides, the plaintiff also repudiated the contract. The repudiation may be anticipatory or repudiatory in nature depending on whether time for performance is due but either way it is actionable if it evinces the intention on the part of the defaulting party of not adhering to the contract in a material way.

[53] The law on repudiatory breach is succinctly set out in the Supreme Court case of *Rasiah Munusamy v Lim Tan & Sons Bhd* [1985] 2 MLJ 291 where Mohamed Azmi SCJ said: 'If there is an absolute refusal to perform, the other party may treat himself as discharged. Short of an express refusal, however, *the test is to ascertain whether the action or actions of the party in the default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions* ...'. (Emphasis added.)

[54] In respect of anticipatory breach, Peh Swee Chin J (as he then was) in *Teh Wang San & Sons Sdn Bhd v See Teow Chuan* [1984] 1 MLJ 130 said: 'I would respectfully adopt the view of Lord Reid. A repudiation in advance by one party to the contract, he will not perform it before the arrival of the time for the performance by the repudiating party, does not by itself, amount to a breach of contract, though it may optionally be regarded as such a breach by the other party in treating it as at an end'. The Court of Appeal in *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 170 found justification for the termination of the contract based on anticipatory breach of contract — see *Sinnadurai Law of Contract* (4th Ed) at p 965 (12.34). In that case Mohd Hishamuddin JCA said: 'In addressing this issue we propose to begin by alluding to the basic principles. *Even in a case where time is not of the essence, it has been held that where the delay in the performance of a contract becomes so prolonged as to go to the root of the contract, the aggrieved party is entitled to rescind the contract* (see *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401). In *Unitramp v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's Rep 212, it was held that the governing test in determining whether any delay on the part of a party to a contract is performing his obligation is sufficient to justify the other party treating the contract as being repudiated is whether such delay would frustrate the commercial adventure. *In other words, the conduct of the defaulting party does not just result in commercially unacceptable delay but is so serious so as to frustrate the adventure*. In our judgment, on the facts of the present case, it is plain and obvious that the venture has been frustrated by the conduct of the appellant'. (Emphasis added.)

[55] Furthermore it is prescribed in s 40 of the Contracts Act 1950 that: 'When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence to its

continuance'. As to the meaning of a party disabling itself, Augustine Paul FCJ in the Federal Court case of *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 said: 'The relevant words in section 40, that is to say, 'disabled himself from performing the promise ...' ... are wide enough to include any act on the part of a party which has the effect of bringing the contract to an end ... *This state of affairs was brought about by the act of the defendant itself thereby disabling it from performing its part of the agreement. The defendant cannot disable itself from performing a contract brought about by its own acts* ...' (Emphasis added.)

[56] Since I have found that the reasonable time for the plaintiff to have performed its major obligations of procuring the land and obtaining the necessary approvals of the project factory to be on or before 15 June 2009, the plaintiff was thus in repudiatory breach of contract by September 2009. Even if the plaintiff otherwise thinks that it was entitled to a longer period beyond September 2009 to perform those obligations, the inevitable fact is that the plaintiff would still not be able to perform them thereafter without inordinate delay. In consequence the plaintiff would still be in anticipatory breach of contract. Either way, it is justified for the third defendant to terminate the contract agreement in September 2009 because the plaintiff had plainly disabled itself to give effect to the commercial object of the contract agreement.

[57] The House of Lords in *Vitol SA v Norelf Ltd; The Santa Clara* [1996] 3 All ER 193 laid down the following principles governing repudiation and the acceptance of the breach by an aggrieved party:

(a) where a party has repudiated a contract the aggrieved party has an election to accept the repudiation or to affirm the contract;

(b) an act of acceptance of repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end; and

(c) it is sufficient that the fact of the election comes to the repudiating party's attention, for example notification by an unauthorised broker or other intermediary may be sufficient.

[58] By the pleadings, the third defendant has stated that the termination of the contract agreement was effected on 14 September 2009 based on its letter that was received by the plaintiff on that day. On close scrutiny of the letter, the third defendant did not therein intimate that the third defendant terminated the contract but alluded to the fact that it was *the plaintiff* instead who treated the contract as cancelled. The plaintiff has however considered that the contract agreement still subsisted. In this regard, PW1 testified that there was

a conversation between Mr Birkmaier and him over the telephone whereby the third defendant acceded to the plaintiff's request for a further extension of time to pay. The subsistence of the contract agreement is consistent with the conduct of the third defendant on 16 September 2009 sending its invoice to the plaintiff for payment by 30 September 2009.

[59] Hence it is apparent that the third defendant has by conduct only treated the contract agreement as cancelled post September 2009 as also acknowledged by the plaintiff subsequently in its letter of 8 January 2010 to the third defendant. The parties are nevertheless bound by their pleadings and the crucial point is hence whether the third defendant was justified at law to treat the contract agreement as terminated on 14 September 2009. In *Joo Seng Trading Co v Commercial Importers and Distributors Sdn Bhd* [2007] 4 MLJ 128 the Court of Appeal held it is settled law that a contract breaker who gives no reason or a bad reason for terminating a contract is nonetheless entitled at trial to justify the termination on good grounds. On the facts of this case, it is arguable whether the third defendant prematurely terminated the contract on 14 September 2009 by reason of the plaintiff's failure to issue the letter of credit because the third defendant had already in June 2009 gave the plaintiff extension of time till 17 September 2009. It was short of three days but this may not necessarily be fatal as seen in *Hill (J M) & Sons Ltd v London Borough of Camden* (1980) 18 BLR 31 (CA). The third defendant was hence entitled to rely on cl 9.4 of the contract agreement to terminate the contract. Even if it was not justified for the third defendant to terminate on 14 September 2009 for non-issuance of the letter of credit per se, I nevertheless find and hold that the third defendant was entitled to treat the contract agreement as rescinded for repudiatory or anticipatory breach of contract at that material time. It is plain that the plaintiff also eventually still failed to pay the third defendant on 30 September 2009.

[60] In the premise, I find and hold that the contract agreement was hence lawfully terminated by the third defendant.

[61] I am however unable to accept the further argument of the plaintiff that the third defendant by its letter dated 14 September 2009 wrongfully cancelled the contract in reliance on cl 8.3.7 of the contract agreement. Again on close reading of the letter, the third defendant therein only referred to cl 8.3.7 on its entitlement to late payment compensation. It is in my view a right in addition but not in abrogation of the third defendant's right to terminate the contract.

[62] The plaintiff has further argued that based on PW1's testimony there was a further conversation between Mr Birkmaier and him in December 2009 over the telephone wherein the third defendant intimated that the contract agreement was still subsisting at that point in time. I find that the plaintiff was

mistaken here because PW1's testimony contradicted the plaintiff's own letter dated 8 January 2010 written by PW1 that he acknowledged the contract agreement had already lapsed since September 2009. In fact the plaintiff was by that letter appealing to the third defendant for the re-activation of the contract agreement.

[63] The other issue on liability is that of conspiracy by the defendants to injure the plaintiff. The elements of actionable conspiracy is set out in the Court of Appeal case of *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 303 where Low Hop Bing JCA said 'For tort of conspiracy, there must be an unlawful object or if not in itself unlawful it must be brought about by unlawful means. There must be coexistence of an agreement with an overt act causing damage to the plaintiffs. The tort is complete if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish (i) an agreement between two or more persons; (ii) for the purpose of injuring the plaintiff; and (iii) acts done in execution of that agreement resulted in damage to the plaintiff'. These elements must be pleaded sufficiently as held by the Court of Appeal in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394.

[64] It is the plaintiff that alleges conspiracy and the plaintiff accordingly bears the burden to prove it following ss 101–103 of the Evidence Act 1950.

[65] As to first element on agreement, it has not been pleaded precisely by the plaintiff as between whom, when, where and how the agreement was concluded. PW1 even testified that he did not know of any agreement by the defendants to injure the plaintiff. The plaintiff therefore only postulated circumstantially there was an agreement amongst the defendants before 14 September 2009 due to the letters concurrently sent out by the first and third defendants to the plaintiff on 14 September 2009 respectively. This is however a bare charge without any cogent evidence to support it. There is crucially no evidence led by the plaintiff that the first and third defendants have known one another on or prior to 14 September 2009. I have no reason to doubt the testimony of DW1 that the first defendant in fact only met the third defendant in December 2009 after the first defendant contacted the third defendant earlier that month to ascertain the status of the project. This was because the plaintiff did not respond to the first defendant's letter dated 14 September 2009 and PW1 was also then un-contactable.

[66] In respect of the second element of unlawful purpose of injuring, this has also not been pleaded precisely by the plaintiff nor proved by the plaintiff with cogent evidence. The plaintiff vaguely argued that the first defendant's letter dated 14 September 2009 imposed unreasonable conditions since it was

issued on the same day as the third defendant's letter of cancellation of the contract agreement. Ultimately, it resulted in the third defendant entering into a new contract with the second defendant which is a dormant company. However, PW1 was unable to explain at the trial as to why the conditions imposed by the first defendant's letter were unreasonable. In fact, he finally agreed under cross-examination that there was nothing unreasonable in the letter. Even if the conditions were unreasonable, they were not unlawful as the first defendant was perfectly entitled to protect its commercial interests.

[67] I thus find and hold there was nothing neither wrong nor unlawful in the fact that both the first and third defendants' letters were dated the same day. It was mere coincidence. The plaintiff attempted to suggest there was some sinister motive but that has not been borne out from the evidence adduced. The contents of both letters do not support the plaintiff's accusation. In any event, motive is irrelevant in a conspiracy charge as held in *Seah Siang Mong v Ong Ban Chai & Anor* [1998] 1 CLJ Supp 295. As to the subsequent entry of the new contract between the second defendant and third defendant on 3 February 2010, I accept the explanation of DW1 and do not find it unusual for a holding company to utilise its subsidiary to carry out the business. Furthermore the contract was only entered after a detail business feasibility appraisal was carried out by the first defendant. It was not made in haste and this militated the suggestion that the project was hijacked.

[68] In addition I find and hold that the defendants' actions were merely to protect their own self interest to undertake an equivalent suture manufacturing project. In *Jaks-KDEB Consortium Sdn Bhd v Perbandanan Urus Air Bhd & Ors* [2012] 3 MLJ 324, Hasnah Mohd Hashim JC (as she then was), said: 'Applying the above principles where the act is lawful, the predominant purpose must be to cause loss to the plaintiff for there to be conspiracy. *If the predominant purpose is for self interest or protection of the defendants, it is not unlawful purpose and there is no conspiracy, even if the plaintiff incidentally suffers loss* ... since the supply agreement was entered into by the parties was devoid of any intention to grant any form of exclusivity to one party, the defendant was therefore not in breach of the supply agreement by failing to order or purchase the pipes and fittings from the plaintiff'. (Emphasis added.) As found, the third defendant lawfully terminated the contract agreement in September 2009. The third defendant is hence at liberty to contract with others. In the meantime, the first defendnat withdrew its participation in the project since the plaintiff did not respond or reply to the first defendant's letter of 14 September 2009. The plaintiff also neglected to inform the first defendant that the contract agreement with the plaintiff had been terminated at the material time.

[69] I have further noted that PW1 conceded there was no exclusivity agreement between the plaintiff and the third defendant. Accordingly, the third

defendant is in principle entitled to enter into an agreement with a third party including the second defendant without being in breach of contract. In the premises, I find and hold that the contract between the second and third defendant was made with a lawful object and by lawful means.

[70] As to the third element on loss suffered by the plaintiff as the result of the alleged conspiracy, PW1 testified that the plaintiff had incurred RM4,100,000 todate and loss of profit in excess of 100m Ringgit over ten years of anticipated suture production. This claim is of course subject to strict proof at the assessment of damages stage provided conspiracy as alleged is established.

[71] Since the first and second elements of the alleged conspiracy have not been cogently proved herein, I reject the plaintiff's plea that the defendants have conspired to hijack the project from the plaintiff.

[72] The plaintiff has also argued that it was fatal for the third defendant to have submitted no case to answer herein and relied on the Supreme Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of the Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 that an adverse inference is to be drawn for the non calling of Mr Birkmaier as the witness for the third defendant. I find and hold that this argument is misconceived by reason that the evidence adduced as at the close of the plaintiff's case is adequate for me to conclude that the contract agreement was lawfully terminated as well as there was no conspiracy to injure as far as the third defendant is concerned.

CONCLUSION

[73] I sympathise with the plaintiff for having expended time and effort in the endeavor to embark on this novel project which may prove to be very profitable. PW1 is undoubtedly very passionate over it. Nevertheless the plaintiff was overly optimistic especially on the financing aspect of the project implementation. This over optimism of its ability to secure the loan financing timeously led to the plaintiff's eventual inability to honour the obligations assumed by the plaintiff in the contract agreement.

[74] The plaintiff also harboured under the unrealistic expectation that the third defendant would tolerate and accommodate the plaintiff's predicaments. This is proven not to be the case in this international business transaction. The parties were held to the punctuality of their contractual bargain.

[75] Based on the pleaded case of unlawful termination of the contract agreement and tort of conspiracy, I have found and held that they have not been established in favour of the plaintiff. Accordingly, the plaintiff's claim and

prayers as sought are unsustainable and I hereby order that they be dismissed with costs. There is thus no need to proceed to the next stage for assessment of damages.

Claim dismissed with costs.

Reported by Afiq Mohamad Noor